Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-226-94
ANUAR CJ (MALAYA), EDGAR JOSEPH JR AND WAN ADNAN FCJJ
15 DECEMBER 1995

Civil Procedure *— Appeal — Appeal against decision of senior assistant registrar — Appeal to judge in chambers — Whether by way of rehearing — Whether similar as appeals from subordinate courts — Whether judge exercising appellate jurisdiction — Whether judge confined to points taken before registrar*

Civil Procedure *— Judgment — Application for setting aside — Irregularity — General principles*

Civil Procedure *— Judgment — Default of appearance — Application to set aside — Default judgment entered against borrower for liquidated sum with interest at 'prescribed rate' — 'Prescribed rate' defined in loan agreement but not in judgment — Fluctuating interest rate — Whether judgment ambiguous — Whether judgment irregular — Whether default judgment a nullity*

Civil Procedure *— Judgment — Default of appearance — Application to set aside — Application filed three years after judgment — Whether amounted to inordinate delay — Whether delay was fatal to the application — Whether court could exercise discretion to allow application despite delay*

Civil Procedure *— Judgment — Default of appearance — Application to set aside — Whether applicant need to bring matter terms on which consent judgment could be set aside — Whether judgment in default of appearance similar to consent judgment*

On 8 July 1988, Arab-Malaysian Finance Bhd ('the respondent') entered a judgment in default of appearance against one of its borrowers ('the appellant') for the sum of RM4,923,242.69 with interest 'at 1% above the prescribed rate ... on a daily rests ...'. The appellant filed an application to set aside the judgment on the ground that it was irregularly obtained, as it is provided under O 83 r 4(1) of the Rules of the High Court 1980, that in a charge action begun by writ, judgment in default of appearance shall not be entered except with the leave of the court. The senior assistant registrar ('the SAR') decided in favour of the appellant, and set aside the default judgment. Dissatisfied, the respondent appealed to the judge in chambers. At the hearing, the appellant further contended that the default judgment was uncertain, as although the words 'prescribed rate of interest' ('the words') were mentioned in the judgment, it was not defined therein, and therefore, the appellant would not be able to ascertain the amount which he was legally liable to pay ('the appellant's contention'). The judge allowed the respondent's appeal on the grounds that: (i) there was no question of a contravention of O 83 r 4(1), as the respondent's action against the appellant was not a charge action; (ii) the court could not consider the appellant's contention, as it had not been raised before the SAR; (iii) the defects

in the judgment could be cured in any event, as the words were clearly defined in the appellant's loan agreement; and (iv) there was an inordinate delay on the part of the appellant in filing the application to set aside the default judgment. The trial judge also ruled that the judgment in this case was similar to a consent judgment, and thus, the appellant should bring the matter within the terms on which a consent judgment could be set aside in order to succeed in setting aside the default judgment. The judge then proceeded to restore the default judgment, after deleting the words 'daily rests basis' from it, even though this application of the respondent was not before him for disposal, and neither counsel was heard on the merits. The appellant appealed.

Held, allowing the appeal:

(1) It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute, or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity. The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justitiae, that is to say, irrespective of the merits and without terms. However, the application to set aside such a judgment should be made: (i) with reasonable promptitude; and (ii) before the defendant has taken any fresh step after becoming aware of the irregularity (see p 36B–D).

(2) In appeals to a judge in chambers from the decision of a registrar of the High Court, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. The appeals from decisions of the registrar are by way of an actual rehearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the registrar, so that the rule about new points being not generally open to an appellant to take on appeal does not apply. It follows that the judge in this case was wrong in refusing to consider the appellant's contention (see pp 36I and 37A–F); *Blundell v Rimmer* [1971] 1 All ER 1072; [1971] 1 WLR 123 and *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 followed.

(3) Clearly, there had been procedural impropriety in the decision-making process of the judge, as neither counsel had had the opportunity of being heard, and on this ground alone, his judgment could not stand (see p 39D–E).

(4) The default judgment was still uncertain even though reference was made to the loan agreement to resolve the ambiguities therein. The appellant would still be perplexed as to the amount of interest he would have to pay under the default judgment in order to avoid enforcement proceedings, as the default judgment

included an element of contractual interest at a fluctuating rate, and when such interest was to run depended upon the absolute discretion of the respondent. By reason of uncertainty, the default judgment was a nullity (see p 42C–D).

(5) It is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that: (i) no one has suffered prejudice by reason of the appellant's delay; (ii) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or (iii) to let the judgment to stand would constitute an oppression (see p 42G–H) *Atwood v Chichester* (1878) 3 QBD 722 and *Harley v Samson* (1914) 30 TLR 450 followed.

(6) In this case, the delay was not fatal to the appellant's application since the default judgment was by reason of uncertainty, was nullity. Under the court's inherent jurisdiction to prevent abuse of its proceedings, the court has power to set aside the judgment in default, despite the appellant's application being out of time. (see pp 42I and 43A–C); *Beale v McGregor* (1886) 2 TLR 311 followed.

(7) The default judgment was not a consent judgment as it was never alleged by the respondent that there has been any compromise or arrangement between the parties pursuant to which the default judgment had been entered (see p 44E); *Chandless-Chandless v Nicholson* [1942] 2 KB 321, *Thorne v Smith* [1947] KB 307; [1947] 1 All ER 39 and *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 All ER 377; [1982] 1 WLR 499 followed; *Bank Bumiputra Malaysia Bhd v Kredin Sdn Bhd & Anor* [1989] 1 MLJ 323 overruled.

[Bahasa Malaysia summary

Pada 8 Julai 1988, Arab-Malaysian Finance Bhd ('penentang') telah memasuki suatu penghakiman ingkar kehadiran terhadap seorang daripada peminjamnya ('perayu') untuk wang sejumlah RM4,923,242.69 dengan faedah '1% lebih tinggi daripada kadar yang ditetapkan ... atas kiraan harian'. Perayu memfailkan suatu permohonan untuk mengenepikan penghakiman ingkar tersebut atas alasan bahawa ia telah dimasuki secara luar aturan, kerana A 83 k 4(1) Kaedah-Kaedah Mahakamah Tinggi 1980 menyatakan bahawa dalam suatu tindakan gadaian yang dimulakan dengan writ, penghakiman ingkar kehadiran tidak harus dimasukkan kecuali dengan kebenaran mahkamah. Penolong kanan pendaftar ('SAR') telah membuat keputusan yang memihak kepada perayu, dan penghakiman ingkar tersebut telah diketepikan. Penentang tidak berpuas hati, lalu merayu kepada hakim dalam kamar. Semasa perbicaraan, perayu berhujah bahawa penghakiman ingkar tersebut adalah tidak pasti, kerana walaupun perkataan 'kadar faedah yang ditetapkan' dinyatakan dalam penghakiman ingkar, ia tidak ditakrifkan di sana, dan oleh itu perayu tidak dapat menentukan jumlah yang sepatutnya dibayar olehnya di sisi undang-undang ('penghujahan perayu'). Hakim

membenarkan rayuan penentang, atas alasan bahawa: (i) tidak terdapat soalan perlanggaran A 83 k 4(1), kerana tindakan penentang terhadap perayu bukan merupakan suatu tindakan gadaian; (ii) mahkamah tidak boleh mempertimbangkan penghujahan perayu, kerana ia belum pernah dibangkitkan di hadapan SAR; (iii) walau bagaimanapun, kecacatan dalam penghakiman ingkar tersebut boleh dirawati kerana perkataan tersebut telah ditakrifkan dengan jelasnya dalam perjanjian pinjaman perayu; dan (iv) terdapat kelambatan yang melampau pada pihak perayu dalam memfailkan permohonannya untuk mengenepikan penghakiman ingkar. Hakim tersebut juga memutuskan bahawa penghakiman ingkar dalam kes ini adalah sama dengan suatu penghakiman persetujuan, dan oleh itu, perayu harus membawa perkara ini dalam terma di mana suatu penghakiman persetujuan dapat diketepikan jika dia ingin mengenepikan penghakiman ingkarnya. Hakim tersebut kemudiannya mengembalikan penghakiman ingkar tersebut selepas memotong perkataan 'atas dasar kiraan harian' daripadanya, walaupun permohonan penentang ini tidak dikemukakan kepadanya untuk diputuskan, dan meritnya tidak dibentangkan oleh peguam-peguam yang terlibat.

Diputuskan, membenarkan rayuan itu:

(1) Adalah asas bahawa suatu penghakiman luar aturan ialah suatu penghakiman yang dimasukkan selain daripada dalam pematuhan ketat kaedah atau statut, ataupun yang telah dimasukkan akibat sesuatu kesalahan yang dianggap begitu serius sehingga menyebabkan pembatalan prosiding berkenaan. Menurut peraturan am, apabila mahkamah telah ditunjukkan dengan jelas sehingga ia berpuas hati bahawa sesuatu penghakiman itu adalah di luar aturan, pihak defendan adalah berhak untuk mengenepikannya ex debito justitiae, atau dengan perkataan lain, tanpa mengira meritnya dan tanpa apa-apa terma. Walau bagaimanapun, permohonan untuk mengenepikan penghakiman sedemikian harus dibuat: (i) dengan kesegeraan yang munasabah; dan (ii) sebelum defendan mengambil sebarang langkah selepas dia sedar tentang luar aturan tersebut. (lihat ms 36B–D).

(2) Dalam rayuan kepada hakim dalam kamar daripada keputusan pendaftar Mahkamah Tinggi, hakim tersebut tidak melaksanakan bidang kuasa rayuan yang sama seperti apabila beliau membicarakan rayuan daripada penghakiman, keputusan atau perintah daripada mahkamah subordinat. Rayuan-rayuan daripada keputusan pendaftar adalah secara perbicaraan semula and hakim tersebut membicarakan perkara itu seperti beliau membicarakannya buat kali pertama. Oleh itu, hakim tersebut adalah tidak terbatas kepada perkara yang telah ditimbulkan di hadapan pendaftar sahaja, dan maka, peraturan bahawa perkara baru tidak boleh ditimbulkan oleh perayu dalam rayuan tidak terpakai. Ekoran itu, hakim dalam kes ini adalah salah apabila beliau enggan mempertimbangkan penghujahan perayu (lihat ms 36I dan 37A–F); *Blundell v Rimmer* [1971] 1 All ER 1072; [1971] 1 WLR 123 and *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 diikut.

(3) Adalah jelas bahawa terdapat kesalahan prosedur dalam proses membuat keputusan hakim tersebut, kerana peguam-peguam yang terlibat tidak berpeluang untuk mengemukakan kes, dan atas alasan ini sahaja, penghakiman beliau tidak boleh dikekalkan (lihat ms 39D–E).

(4) Penghakiman ingkar tersebut adalah masih tidak jelas walaupun rujukan telah dibuat kepada perjanjian pinjaman untuk menyelesaikan ketaksaan dalam penghakiman ingkar berkenaan. Ini adalah kerana perayu masih lagi bingung mengenai jumlah faedah yang dia harus bayar di bawah penghakiman ingkar tersebut untuk mengelakkan prosiding penguatkuasaan kerana penghakiman ingkar tersebut mengandungi unsur faedah kontraktual pada kadar yang berubah-ubah, dan dari bila faedah itu harus dikira bergantung kepada budi bicara mutlak penentang (lihat ms 42C–D).

(5) Adalah undang-undang jelas bahawa mahkamah masih mempunyai budi bicara untuk mengenepikan penghakiman luar aturan walaupun terdapat penangguhan yang panjang, asalkan ia berpuashati bahawa: (i) tidak ada hak sesiapa yang telah terjejas akibat penangguhan perayu; (ii) alternatifnya, jika hak berkenaan telah terjejas, ia boleh diatasi dengan suatu perintah yang sesuai untuk kos; ataupun (iii) jika penghakiman tersebut dibiarkan, suatu penindasan akan berlaku (lihat ms 42G–H); *Atwood v Chichester* (1878) 3 QBD 722 and *Harley v Samson* (1914) 30 TLR 450 diikut.

(6) Dalam kes ini, penangguhan yang terlibat tidak membawa padah kepada permohonan perayu, kerana penghakiman ingkar tersebut sesungguhnya adalah terbatal akibat ketidakpastian. Di bawah bidang kuasa mahkamah yang sedia ada untuk menghalang penyalahgunaan prosiding, mahkamah mempunyai kuasa untuk mengenepikan penghakiman ingkar itu, walaupun permohonan perayu telah melampaui had masa. (lihat 42I dan 43A–C); *Beale v McGregor* (1886) 2 TLR 311 diikut.

(7) Penghakiman ingkar tersebut tidak sama dengan suatu penghakiman persetujuan, kerana penentang tidak pernah mengatakan bahawa terdapat sebarang kompromi atau persefahaman antara kedua-dua pihak sebelum penghakiman ingkar tersebut dimasukkan (lihat ms 44E); *Chandless-Chandless v Nicholson* [1942] 2 KB 321, *Thorne v Smith* [1947] KB 307; [1947] 1 All ER 39 and *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 All ER 377; [1982] 1 WLR 499 diikut; Bank *Bumiputra Malaysia Bhd v Kredin Sdn Bhd & Anor* [1989] 1 MLJ 323 ditolak.]

Notes

For cases on appeals, see 2 Mallal's Digest (4th Ed, 1994 Reissue) paras 259–699.

For case on judgments, see 2 Mallal's Digest (4th Ed, 1994 Reissue) paras 1824–2030.

Cases referred to

Armitage v Parsons [1908] 2 KB 410

Atwood v Chichester (1878) 3 QBD 722
Bank Bumiputra Malaysia Bhd v Kredin Sdn Bhd & Anor [1989] 1 MLJ 323
Beale v McGregor (1886) 2 TLR 311
Blundell v Rimmer [1971] 1 All ER 1072; [1971] 1 WLR 123
Chandless-Chandless v Nicholson [1942] 2 KB 321
Harley v Samson (1914) 30 TLR 450
Hughes v Justin [1894] 1 QB 667
Malayan United Bank v Mohammed Salleh bin Mohammed Yusoff & Ors [1988] 3 MLJ 165
Marsh v Marsh [1945] AC 271
Muir v Jenks [1913] 2 KB 412
Sanders v Hamilton (1907) 96 LT 679
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97
Siebe Gorman & Co Ltd v Pneupac Ltd [1982] 1 All ER 377; [1982] 1 WLR 499
Tan Tin Swee v Kangar Properties Sdn Bhd [1990] 3 MLJ 167
Thorne v Smith [1947] KB 307; [1947] 1 All ER 39
Wiseman v Wiseman [1953] 1 All ER 601; [1953] 2 WLR 499

Legislation referred to

Rules of the High Court 1980 O 2 r 2(i), 42 r 4(1), 42 r 13, 83 r 4(1) 83 r 13

Appeal from: Civil Suit No D3–23–951–1988 (High Court, Kuala Lumpur)

Su Tiang Joo (*Alice Kweh* with him) (*Cheah Teh & Su*) for the appellant.
Benjamin John Dawson (*Nik Hussain & Partners*) for the respondent.

Edgar Joseph Jr FCJ: The short point which arose for decision in this appeal concerned the validity of a judgment in default of appearance dated 8 July 1988, which had been entered in the Commercial Division of the High Court, Kuala Lumpur, ('the default judgment') against the defendant, who was the appellant herein, at the instance of the plaintiff, who was the respondent to this appeal. The default judgment was in the following terms:

> Judgment in default of appearance
>
> No appearance having been entered by the defendant. It is this day adjudged that the said defendant do pay to the plaintiff the said sum of RM4,923,242.69 at 31 March 1988 together with interest thereon at 1% above the prescribed rate which is the sum of the margin (as therein defined) and the base lending rate of the plaintiff on a daily rests from 1 April 1988 till the date of full realisation and costs on a solicitors and client basis to be taxed.
>
> Dated 8 July 1988.
>
> —Sgd—
> The Senior Assistant Registrar
> High Court, Kuala Lumpur

The appellant then caused to be filed an application by way of summons-in-chambers dated 4 December 1991, to set aside the default judgment on the ground that it was not regularly obtained. A

It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity. B

The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justitiae, that is to say, irrespective of the merits and without terms. Having said that, it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O 2 r 2(i) of the Rules of the High Court 1980.) C

The appellant's application to set aside the default judgment came on for hearing before the senior assistant registrar on 3 January 1991, when the only issue argued by way of a preliminary point of law was whether the default judgment had been entered in contravention of O 83 r 4(1) of the Rules of the High Court 1980, which provides, that in a charge action begun by writ, judgment in default of appearance shall not be entered except with the leave of the court. D E

At the conclusion of the arguments, the senior assistant registrar reserved judgment and on 17 January 1992, he ruled in favour of the appellant and held that the default judgment had indeed been entered in contravention of O 83 r 4(1), the necessary leave to do so not having been obtained, and he accordingly set aside the same and gave unconditional leave to the appellant to defend the action. F

The respondent then, by notice of appeal dated and issued by the senior assistant registrar on 17 January 1992, appealed to the judge in chambers who held that the action wherein the default judgment aforesaid had been obtained was not a charge action and therefore, there could be no question of a contravention of O 83 r 4(1). Although in his application to the senior assistant registrar to set aside the default judgment, the appellant had relied upon various other grounds to do so, the learned judge took it upon himself to hear the application at first instance, instead of remitting the same to the senior assistant registrar for hearing on the merits. G H

We would add that before the learned judge, counsel for the appellant had impugned the validity of the default judgment on the ground that it was uncertain and unclear on the face of it and, in consequence, a nullity and/or an irregular judgment, but his Lordship declined to consider the contention on the ground that it had not been raised before the senior assistant registrar, and was therefore a new point which it was not open to the appellant to take. I

With respect, in appeals to a judge in chambers from the decision of a registrar of the High Court, the judge is not exercising appellate jurisdiction

in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. Such appeals from decisions of the registrar are by way of an actual rehearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply. In support, we would refer to the following passage in the judgment of Payne J in *Blundell v Rimmer* [1971] 1 All ER 1072 at p 1076; [1971] 1 WLR 123 at p 127:

> I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was contended by counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him — that no point could be raised before me which was not raised below. It is, I think, clear on authority that the appeal from the district registrar is a rehearing of the application and I am entitled to treat the matter as though it had come before me for the first time, and, moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves. Authority for this proposition can be found in the speech of Lord Atkin in *Evans v Bartlam* and in the notes in 1 The Supreme Court Practice 1970 at p 759 para 58/1/2, p 762 para 58/4/1, under RSC O 58 rr 1 and 4.

In *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at p 106 Edgar Joseph Jr SCJ, when speaking for the Supreme Court, had occasion to refer to the above passage in the judgment of Payne J with approval.

The judge was therefore wrong in refusing to consider the contention of the appellant that the default judgment was invalid. We must therefore direct our attention to this contention.

The appellant's complaint was that the 'prescribed rate of interest' although mentioned in the default judgment is not defined therein, and hence a borrower in his position would not be able to ascertain for himself the amount which he is legally liable to pay, if he is to avoid proceedings for enforcement of the default judgment.

The case of *Marsh v Marsh* [1945] AC 271 (PC) at p 284 shows that there is no decisive test for ascertaining what irregularities will result in a judgment being rendered void as distinct from voidable, though it was there suggested by Lord Goddard when speaking for the Board that one test which may applied is whether the irregularity has caused a failure of natural justice. This is how his Lordship put it (at p 284):

> A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v Praetorius* (1888) 20 QBD 764 and *Smurthwaite v Hannay* [1894] AC 494 are leading examples of the former, while *Fry v Moore* (1889) 23 QBD 395 may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their

> Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice.

However, in *Wiseman v Wiseman* [1953] 1 All ER 601; [1953] 2 WLR 499 at p 509, Denning LJ (as he then was) criticised the above dictum of Lord Goddard, in our view with considerable justification, when he said:

> It has been said that one test of the distinction between void and voidable is to inquire whether the transaction has caused a failure of natural justice; see *Marsh v Marsh*, but I confess that I cannot follow this. If the defect is such as to make the transaction absolutely void, then void it is, no matter whether it causes a failure of natural justice or not. But if the effect of the defect is only to make the transaction voidable, then natural justice may well be taken into account by the court in deciding whether it will in its discretion set the transaction aside or not, but it does not make the transaction automatically void.

Having said that, there are some general observations which we should like to make regarding judgments which have not been regularly obtained. It has been said that a judgment would not be regularly obtained if it has been entered contrary to the rules, as for example, when it has been entered before the time limited for appearance has expired, that is to say, prematurely, (see *Tan Tin Swee v Kangar Properties Sdn Bhd* [1990] 3 MLJ 167), or for an excessive amount, that is to say, larger than is due (see eg *Hughes v Justin* [1894] 1 QB 667). If, however, after realising that judgment has been entered for a larger sum than is due the plaintiff makes application to vary the judgment in default, the court may rectify the error without setting aside the judgment. (See *Muir v Jenks* [1913] 2 KB 412; *Armitage v Parsons* [1908] 2 KB 410.) Incidentally, *Sanders v Hamilton* (1907) 96 LT 679 shows that application may be made by a plaintiff for amendment where judgment has been entered for an amount which is less than is due.

In *Armitage v Parsons*, the plaintiff had obtained judgment in default of appearance and as a result of an error the judgment included a sum by way of costs which exceeded by a few shillings the costs properly payable. An application by the defendant to set aside the judgment in default on the ground of irregularity, was dismissed by the district registrar who instead amended the judgment by reducing the amount accordingly. On appeal to the judge in chambers, the order of the district registrar was affirmed and on further appeal, the decisions below were upheld. The following passages in the judgment of Sir Gorell Barnes, President, merit reproduction (at p 415):

> In my opinion, O XXVIII r 11, which provides that 'clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court or a judge on motion or summons without an appeal' enables us to deal with this case so as to do substantial justice.

And later at (p 417):

> To my mind it is clear, as a matter of good sense and justice, that this was an accidental slip which under O XXVIII r 11 ought to be corrected, and that the whole judgment should not be set aside because of a mistake to the

A insignificant amount of 12s. I do not think that by so amending the judgment any of the rules or any principle of law is infringed. For these reasons I think that the appeal should be dismissed.

In *Malayan United Bank v Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165, the plaintiff had entered judgment which included post B judgment interest for in excess of the statutory rate of 8%pa, but the High Court in refusing to vary the judgment, ruled that the principle in *Armitage v Parsons* did not apply, because there had been no mistake or accidental slip which had occasioned the error.

To revert to the present case, the judge recognized that the default C judgment suffered from the defect that the words 'margin', 'prescribed rate' and 'base lending rate', were nowhere defined therein, but considered that if the default judgment were read along with the loan agreement, the defects would be cured, since it was obvious that those words were defined in the loan agreement. The judge then proceeded to dismiss the appellant's appeal, to amend the default judgment in terms of the respondent's D application, which prayed for the deletion of the words 'daily rests basis' from the judgment, (even though this application was not before him for disposal and so neither counsel was heard on the merits thereof) and he then proceeded to restore the default judgment, subject to these amendments. Clearly, there had been procedural impropriety in the decision-making process, as neither counsel had had the opportunity of E being heard, and on this ground alone, his judgment could not stand.

But, on a further ground also, the appeal was bound to succeed. This bring us to the merits of the appeal.

It is obvious that the default judgment had not been entered in the appropriate form, regard being had to the fact that it was for a liquidated F sum.

In particular, insofar as *contractual interest at a fixed or constant rate* is concerned, the default judgment does not specify sufficiently or at all:

(a) the contract relied on for the claim for interest;

G (b) the meaning of the expressions 'margin', 'prescribed rate' and 'base lending rate' referred to therein;

(c) the date from which contractual interest is owing;

(d) the precise rate of interest fixed by the contract and the amount of contractual interest owing at the date of the issue of the writ; and

H (e) the precise rate of interest fixed by the contract and the total amount of contractual interest owing from the date of issue of the writ to judgment.

[We would interpolate, to remark, that it is advisable to show the amount of interest accruing daily, for ease of calculation. These I particulars could conveniently be embodied in an appendix stapled to the default judgment..]

And, insofar as the default judgment included an element of contractual interest at a *fluctuating rate* is concerned, it does not specify sufficiently or at all:

(1) the rate of interest, the principal sum, the period and the amount of interest and the total amount of interest payable to the date of judgment.;

[These particulars — including the amount of interest accruing daily could conveniently be embodied in an appendix stapled to the default judgment.]

(2) the period of contractual interest as pleaded, save and except that it had to end at the date of judgment and not payment; and

(3) the total amount of interest payable.

To take the point further, we note that the learned judge had referred to the loan agreement for the purpose of resolving the ambiguities in the default judgment with regard to the contractual interest payable thereunder in favour of the respondent. It would be wrong to assume that the learned judge was entitled to do so, but assuming for the sake of argument only, that he was, it would be convenient and useful for a better understanding of this part of the case, if we reproduced the following provisions of the loan agreement:

'Margin'	in relation to the rate of interest payable to AMFB on drawdowns or, as the case may be, the loan, two and a half per cent (2½%) or such other rate as may at any time and from time to time hereafter be varied or substituted therefor by AMFB pursuant to section 4.06.
'Prescribed rate'	the rate of interest applicable to the loan as set out in section 4.04(1) and includes any other rate as may at any time and from time to time hereafter be varied or substituted therefor by AMFB pursuant to section 4.06.
'Default rate'	the rate of interest payable in respect of any sum (whether principal, interest or otherwise) in arrears as set out in section 4.07 and includes any other rate as may at any time and from time to time hereafter be varied or substituted therefor by AMFB pursuant to section 4.07.
'Interest payment date'	any of the due dates for payment of interest charges as set out in section 4.04(2)(b).

Section 4.04 Interest

(1) The borrower shall pay interest as from the first drawdown date on the drawdowns or, as the case may be, the loan from time to time outstanding and remaining unpaid at the rate per annum which is: (a) the sum of the *margin and* the *base lending rate* of AMFB; or (b) fourteen and a half per cent (14½%) whichever of such rates is the higher (hereinafter referred to as 'the *prescribed rate*' which expression shall include whenever and wherever the context so requires such other rate as may be varied or substituted therefor by AMFB pursuant to section 4.06) with monthly rests and in accordance with the following provisions of this section 4.04.

(2) Such interest at the prescribed rate shall: (a) as from the first drawdown date until the final drawdown date be calculated on the daily outstanding balance of the drawdowns on the basis of a 365 day year (or 366 day

year in the case of a leap year) and accrues from day to day and thereafter on the loan from time to time outstanding on the basis of a year of twelve 30-day months; and (b) be payable by the borrower quarterly in arrears the first of such quarterly interest payments to be paid on the date corresponding numerically to the first drawdown date which falls in the third calendar month following next after the first drawdown date (or *such other date as may be stipulated by AMFB in its absolute discretion*) and the subsequent quarterly interest payments to be made on the same date of every third calendar month thereafter save that the last of such quarterly interest payments shall be paid together with the repayment of the loan or the balance thereof remaining unpaid on or prior to the repayment date.

(3) Whenever there is a change in its base lending rate which would affect the rate of interest payable under this section 4.04(1) AMFB shall promptly notify the borrower of the resulting change in such rate or interest payable in accordance with this section 4.04(1), which shall take effect as from the date on which the change in the base lending rate is effective.

(4) A certificate signed by any of the authorized officers of AMFB as to the prescribed rate of interest applicable, the manner of computation and amount of such interest payable at any time hereafter and the due dates for payment thereof shall be conclusive and binding on the borrower save for any manifest error.

Section 4.06 Variation of interest rate

Notwithstanding the margin as set out in section 2.01 or the provisions relating to the rate of interest as provided in section 4.04(1) AMFB shall be entitled at any time and from time to time hereafter to *vary at its absolute discretion* the margin or the rate of interest applicable to the loan by serving a notice in writing on the borrower of such its intention and such amended rate of interest shall be payable as from the date specified in the said notice. Service of such notice may be made by letter addressed to the borrower and sent by ordinary post or despatched by personal delivery to the borrower's address stated in section 9.01 or the last known place of business or residence of the borrower and any such notice if sent by post shall be deemed to have been given or served two (2) days after the letter containing the same is put into the post office at Kuala Lumpur and in proving such giving or service it shall be sufficient to prove that the letter was properly addressed, stamped and put into a post office at Kuala Lumpur and notwithstanding the fact that such letter may be returned to the post office undelivered. (Emphasis added.)

Section 4.07 Damages for late payments

In addition to and without prejudice to the rights powers and remedies herein conferred upon AMFB under Article VII and the Memorandum of Deposit if the borrower shall default in the payment of any sum (whether for principal or interest or commitment fee or otherwise) on the due date, the borrower shall pay to AMFB damages by way of interest at the rate of one fifteenth of one per cent (1/15%) per day on such sum or other moneys at that time in arrears calculated on the daily outstanding amount or balance thereof with effect from the due date until the date of receipt of payment thereof by AMFB as well after as before any court order or judgment. Any interest payable under this section 4.07 which is not paid when due hereunder

> shall be added on to the overdue sum and bear interest accordingly. Notwithstanding such default rate AMFB shall be entitled at any time and from time to time hereafter to vary at its discretion such default rate by serving a notice in writing on the borrower of such its intention and such amended rate of default interest shall be applicable as from the date specified in the said notice. Service of such notice may be effected in the same manner as a notice for the variation of the interest rate under section 4.06.

All references in the provisions aforesaid to 'the borrower' and 'AMFB' are, of course, to the appellant and the respondent, respectively.

Having regard to the provisions aforesaid, we consider — contrary to what the learned judge held — that resort to the loan agreement would still have not resolved the ambiguities in the default judgment in favour of the respondent, for the appellant would still be perplexed as to the amount of interest he would have to pay, and so he would be perplexed as to the total sum he would have to pay under the default judgment in order to avoid enforcement proceedings. We say so, because, in epitome, the default judgment, included an element of contractual interest at a fluctuating rate and when such interest was to run depended upon the absolute discretion of the respondent, and so was clearly uncertain.

We were thus satisfied that the appellant had demonstrated that on the face of it, the default judgment, insofar as liability thereunder, for the payment of contractual interest was concerned, did not specify sufficiently or at all, the several matters to which we have referred, and so was riddled with uncertainty, serious enough to render it an irregular judgment within the meaning of the authorities.

But the further hurdle which confronted the appellant and which he had to surmount was that there had been a spectacular delay of some three years before he bestirred himself into applying to the High Court to set aside the default judgment though admittedly, he had not taken any fresh step after becoming aware of the irregularity.

Nevertheless, it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:

(a) no one has suffered prejudice by reason of the defendant's delay;

(b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or

(c) to let the judgment to stand would constitute oppression. (See *Atwood v Chichester* (1878) 3 QBD 722; *Harley v Samson* (1914) 30 TLR 450.)

We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time, if the particular circumstances of the case require the intervention of the court. (See *Beale v McGregor* (1886) 2 TLR 311.)

By way of explanation for his delay in making his application to set aside the default judgment, the appellant had put forward the improbable

explanation, which the judge had no hesitation in dismissing as 'ludicrous', that he had allowed judgment in default to go against him because he could not afford to engage solicitors. Having regard to his business status and experience, we agreed with the judge that this was a 'ludicrous' explanation, and was therefore unacceptable. But, delay alone, having regard to the circumstances of the present case, was not necessarily fatal to the appellant's case.

In our view, having regard to the principles enunciated above, on when the court can condone delay on the part of a defendant, the tardiness or the laches of the appellant in making his application, to set aside the default judgment, was not fatal to his application, especially since, in our view, the default judgment was by reason of uncertainty, a *nullity*, and the amendment made by the judge to it by deleting the words 'on monthly rests', did *not* cure that defect.

For the avoidance of doubt, we would add, that having regard to the chronology of events hereinbefore mentioned, the issue of delay in the present case has been determined without regard to O 42 r 13, which came into force only on 1 August 1993, by virtue of PU(A) 192/93, and which provides:

> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

There is a final point to which we must now direct our attention.

The judge held that where a defendant has deliberately allowed default judgment to be entered against him, it is as if consent judgment has been entered against him, and that 'unless he could bring the matter more or less within the terms on which a consent judgment can be set aside, he would not succeed in his application to have such a judgment set aside'. For this proposition, the judge cited his own judgment in *Bank Bumiputra Malaysia Bhd v Kredin Sdn Bhd & Anor* [1989] 1 MLJ 323, wherein no authorities are cited.

Unfortunately, the judge's attention was not directed to certain other authorities which show clearly that there is a sharp distinction in law between a 'consent order' and an order to which a party is 'not objecting'.

In *Chandless-Chandless v Nicholson* [1942] 2 KB 321 at p 324 CA, Lord Greene MR said this:

> There is a great deal of difference between a consent order in the technical sense and an order which embodies provisions to which neither party objects. The mere fact that one side submits to an order does not make that order a consent order within the technical meaning of that expression.

In *Thorne v Smith* [1947] KB 307 at p 315; [1947] 1 All ER 39 at p 44, Somervell LJ said this:

> The expression 'a consent order' may suggest some compromise or arrangement which might be inconsistent with the provisions of the Acts

> [Rent Restrictions Acts]. When the defendant is agreeing to submit to judgment because he is satisfied that the plaintiff can establish his right to an order under the Acts, it might be advisable to avoid the use of the word 'consent' which may have a wider meaning and cover cases where the 'consent' was the result of an arrangement which could not properly be made the basis of an order.

In *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 All ER 377 at p 380; [1982] 1 WLR 185 at p 189, Denning MR said:

> We have had a discussion about 'consent orders'. It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in *Chandless-Chandless v Nicholson* [1942] 2 KB 321. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties.

In our view, given the circumstances of the present case, the default judgment was not a consent judgment, as it was never even alleged by the respondent that there has been any compromise or arrangement between the parties pursuant to which the default judgment had been entered. The judge was therefore wrong when he said, with regard to the default judgment, that 'it is as if a consent judgment had been entered, and unless the defendant could bring the matter more or less within the terms in which a consent judgment can be set aside, he would not succeed in his application to have such a judgment set aside'.

In all the circumstances, we allowed the appeal, with costs here and below, set aside the judgment of the learned judge and, in consequences, also set aside the default judgment, restored the order of the senior assistant registrar, though for wholly different reasons, and directed that the appellant be at liberty to defend the action which therefore would have to be heard on the merits. Deposit was ordered to be refunded to the appellant.

Appeal allowed..

Reported by Hadmin Zahar Habib Muhamad